

# Calendar No. 1072

91ST CONGRESS }  
2d Session }

SENATE

{ REPORT  
No. 91-1067

ANTHONY P. MILLER, INC.

JULY 30, 1970.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

## REPORT

[To accompany H.R. 15354]

The Committee on the Judiciary, to which was referred the bill (H.R. 15354) for the relief of Anthony P. Miller, Inc., having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

### PURPOSE

The purpose of the proposed legislation is to authorize and direct the Comptroller General to settle and adjust the claim of Anthony P. Miller, Inc., for the installation of fire-resistant wallboard in the ceilings of 41 garages located in an Air Force Capehart housing project at Niagara Falls Municipal Airport, Niagara Falls, N.Y. The bill would authorize the Comptroller General to allow \$2,135.28 in full and final settlement of the claim.

### STATEMENT

The bill, H.R. 15354, was introduced in accordance with the recommendations of the Comptroller General of the United States in a communication directed to the Speaker of the House of Representatives pursuant to the act of April 10, 1928 (45 Stat. 413; 31 U.S.C. 236). The recommendation was made in accordance with this law on the basis of a finding by the Comptroller General that the case contained such elements of equity that it is deserving of the consideration of Congress as a meritorious claim within the meaning of section 236 of title 31 of the United States Code.

The claim represents the cost of additional work performed by the claimant under a contract entered into with the Department of the Air Force dated August 5, 1958. This contract provided for the construction of a Capehart housing project of 290 family units located near the Niagara Falls Municipal Airport, Niagara Falls, N.Y. In accordance with the provisions of law providing for the so-called Capehart housing program, the successful bidder for a project is required to provide for financing the construction costs of the project and upon completion thereof is reimbursed from the proceeds of a mortgage placed thereon and insured by the Federal Housing Administration. This mortgage is paid off by the military departments over a period of not to exceed 30 years from appropriations made for quarters allowances of military personnel. At the time this claim arose the applicable law, 12 U.S.C. 1748b(b) (3) (B), provided that the mortgage shall involve a principal obligation in a sum not in excess of an average of \$16,500 per family unit.

During the course of construction, it was suggested that fire resistant wallboard should be installed in the ceilings of 41 garages. By letter of November 6, 1959, the contracting officer advised the claimant that its offer to install the wallboard for the price of \$2,135.28—the amount of the present claim—was accepted and stated that while a change order would not be issued at that time, the amount involved would be used as a debit and credit change request which might be written at a later date.

Relative to any changes proposed to be made within the scope of the contract, there is for consideration the provisions of paragraph 9 of the general provisions of the contract which reads in part as follows:

(a) The Contracting Officer may, at any time, by a Construction Change Request, Form FHA 2437, and without notice to sureties, propose changes in the Drawings and/or Specifications of this Housing Contract and within the general scope thereof. Each such proposed construction change will be submitted to the eligible builder for his estimate of the increase or decrease in cost and time of performance, if any. After such action by the eligible builder, the proposed construction change will be returned to the Contracting Officer. Likewise, the eligible builder may, without notice to sureties, propose changes within the same scope, all such proposed changes to be in writing and to contain the eligible builder's estimate of the increase in cost and time of performance, if any, and to be submitted to the Contracting Officer. In all cases, the eligible builder will sign proposed construction changes for himself and as agent for the mortgagor-builder.

(b) All proposed construction changes, including those resulting in no increase or decrease of cost, will be submitted by the Contracting Officer to the Commissioner, with copy to the mortgagee. The determination of the Commissioner as to the increase or decrease in cost and time of performance shall be final with respect to all such changes to be paid or deducted from mortgage proceeds. If any such change is approved by the mortgagee and the Commissioner to be paid

or deducted from mortgage proceeds, the amount of the maximum insurable mortgage as herein defined and this Housing Contract will be considered as modified by such approved change order, and the eligible builder shall proceed diligently to execute such approved change.

(c) No change of any character shall be made unless in pursuance of a written order approved as required in the preceding paragraphs, and no claim for adjustment of the contract sum shall be recognized unless the eligible builder, prior to the making of such claim for adjustment, is in receipt of an approved written order.

At the time this additional work was authorized by the contracting officer and performed by the claimant, funds were available for payment from the mortgage proceeds and there is nothing in the record to indicate that the Federal Housing Commissioner would not have approved the required change order had it been presented to him at that time. However, and over the protest of the claimant, all except \$15 of such funds subsequently were used to pay the cost of additional inspection services performed by the architects under a separate contract with the Air Force.

Consequently, since all but \$15 of the maximum amount of the insurable mortgage was obligated or expended, no change order covering the installation of the wallboard was approved or issued by the Federal Housing Commissioner as contemplated by paragraph 9 of the general provisions of the contract.

By letter of March 9, 1961, the Deputy Special Assistant Secretary for Installations, Department of the Air Force, requested our decision concerning the use of appropriated funds to pay certain claims arising under Capehart housing projects including certain claims by the instant claimant. In a Comptroller General decision of May 3, 1961 (40 Comp. Gen. 608), it was held that the limitation on the mortgage obligation per family housing unit constituted a maximum cost limitation per unit so that additional costs, such as costs due to change orders, delays beyond the contractor's control, etc., which would cause the statutory limitation to be exceeded could not be paid from appropriated funds.

Since such claims thus could not be paid administratively this particular claim was included as count VI in the claimant's suit in the Court of Claims entitled *Anthony P. Miller, Inc., v. The United States*, 172 Ct. Cl. 60, 348 F. 2d 475, decided July 16, 1965.

In that decision, the Court of Claims prescribed certain criteria and described certain circumstances where, in its view, appropriated funds properly could be used to pay such additional costs. However, the particular claim herein considered, did not qualify for payment under the prescribed criteria and circumstances and was disallowed by the court. The court felt it was not justified in allowing the claim for the reason that the claimant proceeded with the work without receiving the formal approval required by paragraph 9 of the general provisions of the contract.

Since the claim has been disallowed by the Court of Claims there is no legal liability on the part of the United States to pay it. However, in view of the facts and circumstances herein above set forth

the General Accounting Office believes the claim is meritorious and we recommend that it be given favorable consideration by the Congress.

In summary, those facts and circumstances are that the work was done at the request of the contracting officer at the point in time when it could be most economically performed, at the time the work was authorized the cost thereof was agreed upon in writing and could have been paid from the proceeds of the mortgage without exceeding the statutory limitation, nothing in the record indicates that the Federal Housing Commissioner would not have approved the required change order had it been presented to him at the time the work was authorized, both the contracting officer and the claimant apparently acted in good faith, and the Government has received and retained the benefit of the work performed at the claimant's expense.

The committee has carefully reviewed the facts outlined above and in the communication of the Comptroller General and agrees that this is a proper matter for legislative relief. Accordingly, it is recommended that the bill be considered favorably.

Attached hereto and made a part hereof is the report submitted to the Speaker of the House of Representatives by the Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D. C., December 16, 1969.

B-145318.

HON. JOHN W. McCORMACK,  
*Speaker of the House of Representatives.*

DEAR MR. SPEAKER: Pursuant to the act of April 10, 1928 (45 Stat. 413, 31 U.S.C. 236), we have the honor to transmit our report and recommendation to the Congress concerning the claim of Anthony P. Miller, Inc., against the United States, with the request that you present the same to the House of Representatives.

An identical report is being transmitted to the President of the Senate.

Sincerely yours,

R. F. KELLER,  
*Assistant Comptroller General of the United States.*

COMPTROLLER GENERAL OF THE UNITED STATES,  
Washington, D. C., December 16, 1969.

B-145318.

*To the Congress of the United States:*

Pursuant to the act of April 10, 1928 (45 Stat. 413, 31 U.S.C. 236), we submit the following report and recommendation on a claim by Anthony P. Miller, Inc., for the sum of \$2,135.28.

The claim represents the cost of additional work performed by the claimant under a contract entered into with the Department of the Air Force dated August 5, 1958. This contract provided for the construction of a Capehart housing project of 290 family units located near the Niagara Falls Municipal Airport, Niagara Falls, N.Y. In accordance with the provisions of law providing for the so-called



Capehart housing program, the successful bidder for a project is required to provide for financing the construction costs of the project and upon completion thereof is reimbursed from the proceeds of a mortgage placed thereon and insured by the Federal Housing Administration. This mortgage is paid off by the military departments over a period not to exceed 30 years from appropriations made for quarters allowances of military personnel. At the time this claim arose the applicable law, 12 U.S.C. 1748b(b) (3) (B), provided that the mortgage shall involve a principal obligation in a sum not in excess of an average of \$16,500 per family unit.

During the course of construction, it was suggested that fire resistant wallboard should be installed in the ceilings of 41 garages. By letter of November 6, 1959, the contracting officer advised the claimant that its offer to install the wallboard for the price of \$2,135.28—the amount of the present claim—was accepted and stated that while a change order would not be issued at that time, the amount involved would be used as a debit and credit change request which might be written at a later date.

Relative to any changes proposed to be made within the scope of the contract, there is for consideration the provisions of paragraph 9 of the general provisions of the contract which reads in part as follows:

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At the time this additional work was authorized by the contracting officer and performed by the claimant, funds were available for payment from the mortgage proceeds and there is nothing in the record to indicate that the Federal Housing Commissioner would not have approved the required change order had it been presented to him at that time. However, and over the protest of the claimant, all except \$15 of such funds subsequently were used to pay the cost of additional inspection services performed by the architects under a separate contract with the Air Force.

Consequently, since all but \$15 of the maximum amount of the insurable mortgage was obligated or expended, no change order covering the installation of the wallboard was approved or issued by the Federal Housing Commissioner as contemplated by paragraph 9 of the general provisions of the contract.

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Since the claim has been disallowed by the Court of Claims there is no legal liability on the part of the United States to pay it. However, in view of the facts and circumstances hereinabove set forth we believe the claim is meritorious and we recommend that it be given favorable consideration by the Congress.

In summary, those facts and circumstances are that the work was done at the request of the contracting officer at the point in time when it could be most economically performed, at the time the work was authorized the cost thereof was agreed upon in writing and could have been paid from the proceeds of the mortgage without exceeding the statutory limitation, nothing in the record indicates that the Federal Housing Commissioner would not have approved the required change order had it been presented to him at the time the work was authorized, both the contracting officer and the claimant apparently acted in good faith, and the Government has received and retained the benefit of the work performed at the claimant's expense.

It the Congress agrees that the claim is meritorious and should be paid, it is suggested that enactment of a statute in substantially the following form will accomplish the desired purpose:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Comptroller General of the United States be, and he hereby is, authorized and directed to settle and adjust the claim of Anthony P. Miller, Inc., for installation of fire resistant wallboard in the ceilings of 41 garages located in an Air Force Capehart housing project at Niagara Falls Municipal Airport, Niagara Falls, New York, and to allow in full and final settlement of such claim the sum of \$2,135.28. There is hereby appropriated out of any money in the Treasury not otherwise appropriated the sum of \$2,135.28 for payment of said claim."*

R. F. KELLER,  
*Assistant Comptroller General of the United States.*

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